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No.

IN THE

Supreme Court of the United States

October Term, 1999

DANIEL M. BYRD, III

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Compliance with the Federal Advisory Committee Act, 5 U.S.C. App. II, is required when a federal agency " establishes" or "utilizes" an advisory committee to obtain advice. The Environmental Protection Agency hired a contractor to set up a committee to provide EPA advice. The questions presented are:

1. Can an agency that chooses to use a contractor to set up an advisory committee for that reason be exempted from the openness requirements of the Federal Advisory Committee Act?

2. Whether an agency "establishes" an advisory committee under FACA where it expressly seeks an advisory committee, tasks a contractor with setting one up, and significantly involves itself in the selection of members and committee work?

3. Does an agency "utilize" an advisory committee under FACA where it manages and utilizes the committee in the same manner as a government-formed advisory committee?

Parties to The Proceeding

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit are Daniel M. Byrd, III, and the United States Environmental Protection Agency.

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Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 174 F.3d 239 (D.C. Cir. 1999). (Copy attached in the appendix hereto (hereinafter Pet. App. Section A).

Basis for Jurisdiction

The court of appeals filed its initial opinion on April 30, 1999. The court of appeals denied Petitioner's petitions for rehearing and rehearing *en banc* on August 13, 1999. *See* Pet. App. Section A. On November 3, 1999, Chief Justice Rehnquist entered an order extending the time for petitioner to file a petition for a writ of certiorari until December 9,

1999. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1254(1).

Statute Involved

The provisions of the Federal Advisory Committee Act, 5 U.S.C. App. II, are set out in Pet. App. at Section D.

Statement Of The Case

The Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), provides that "the term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group. . .which is. . . established or utilized by the President[ ] or by one or more agencies, in the interest of obtaining advice or recommendations...." 5 U.S.C. App. II, §3. FACA's compliance requirements apply to "each" advisory committee. §4. Such requirements include opening each advisory committee meeting to the public, allowing attendance by interested persons, and making available for public inspection the records, reports, drafts, and studies made available to each advisory committee. §10(a) & (b). FACA's dual goals included "a housekeeping function in the interests of efficiency and economy in Government and a function of disclosure and objective counsel — so that the public will know what advice their Government is getting and how they might add their contribution to the information process." Statement of Sen. Metcalf (as floor manager), 118 Cong. Rec. S14647 (Sept. 12, 1972), *reprinted in* McMurtry, V., Fed. Advisory Comm. Act (Pub. L. 92-463), Source Book: Legislative History, Texts, and Other Documents at 158 (Cong. Res. Serv. 1978).

A. Regulatory Background

The 1990 Clean Air Act Amendments required EPA to promulgate emissions standards for major sources and source categories of designated hazardous air pollutants ("HAPs "), including benzene. 42 U.S.C. §7412(d). Both EPA's standard

setting for such HAPs and the schedule for the promulgation of regulations of emission of HAPs required the Agency's consideration of risks posed by exposures to particular HAPs. *E.g.*, §7412(b)(2) (revision of list of HAPs based on risk of health effects posed by their emissions); §7412(a)(3)(scheduling regulation of HAPs based on those HAPs *posing* "the greatest threat to public health"); §7412(c)(9) (deletions from the list based on finding that no source emits pollutants presenting a cancer risk greater than one in 1,000,000).

Benzene, a commodity chemical manufactured in high volume, is widely used as a component of gasoline and in a broad range of specialty chemicals. Benzene causes acute myelocytic leukemias in humans, and EPA has regulated it as a hazardous air pollutant under the Clean Air Act, 42 U.S.C. §§7401-7671q, based on the human carcinogenic effect. The first risk assessment[1] for benzene drafted by EPA's Office of Research and Development ("ORD") was scientifically peer reviewed in 1977 by EPA's Science Advisory Board (which operates consistently with FACA). *See* Declaration of Daniel Byrd (" Byrd Decl.") at ¶16 (copy in Pet. App. at Section C). EPA then used the benzene risk assessment in promulgating Clean Air Act regulations. ORD updated the benzene risk assessment in 1985, but did not subject it to scientific peer review, though it used the benzene risk assessment as the basis for new and additional Clean Air Act regulations.

B. The Benzene Advisory Committee

In 1992, EPA' s Office of Mobile Sources, under a Clean Air Act mandate to develop a regulatory strategy to control emissions from motor vehicles and motor vehicle fuels, requested that ORD provide a new update of the human

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[1] A risk assessment employs statistical methods in analyzing the findings of scientific studies of the effects of exposures of humans or animals to chemical substances, in order to extrapolate from such data to a numerical estimate of the risk of human symptoms from a defined exposure dose.

carcinogenic risk of inhaled benzene. In 1997, a Federal Register notice announced a peer-review workshop and public review of ORD's update (an external draft document), "Carcinogenic Effects of Benzene: An Update." 62 Fed. Reg. 35172, 35173 (June 30, 1997), J.A. 214.[2] The notice reported that Eastern Research Group ("ERG"), an EPA contractor, would provide logistical support. *Id.* The workshop was scheduled for July 16, 1998. The notice also stated that "[a]fter the workshop," EPA itself would "consider the peer-panel and public comments before preparing a final report for the Office of Mobile Sources." *Id.* at 35172-73, J.A. 214.[3]

EPA's Statement of Work stated that the purpose of the contractor's work was "to provide support to the U.S. Environmental Protection Agency (EPA) in organizing and conducting an Expert Panel Review (EPR) of the document 'Benzene Risk Assessment Update.'" Statement of Work (Mar. 26, 1997) at 1, J.A. 184. ERG's duties under the Statement of Work included arranging for conference facilities; providing panel members with travel, per diem, and associated expenses; resolving issues concerning format, public attendance, and logistics; preparing nametags and

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[2] This citation refers to the page number of the Joint Appendix ("J.A.") filed in support of briefing in the D.C. Circuit.

[3] Under EPA's classification of the significance of research/regulatory documents for purposes of determining the level of appropriate peer review, the benzene assessment document was assigned to EPA 's highest category, Category I, "Major Scientific or Technical Work Products" *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (copy in Pet. App. Section A). *See also* Statement of Work for "Expert Panel Peer Review of Benzene Risk Assessment Update" (c. Mar. 25, 1997) ("SOW") at 1, Exhibit 3 to Defendant's Summary Judgment Motion, J.A.184. EPA reserves this category for regulatory/technical products of the kind that "[s]upport[ ] major regulatory decisions or policy / guidance of major impact;" "[e]stablish[ ] a significant precedent, model, or methodology;" or "[a]ddress[ ] controversial issues." EPA, "ORD, Standard Operating Procedures for Peer Review of Sci. or Techn. Work Products" (Sept. 30, 1994) at 8, J.A. 125.

placards for panel members; and attending the committee meeting to finalize arrangements. Also, ERG was tasked with selecting committee members from a list provided by EPA and from its own list and submitting its choices for EPA approval; designating a panel chair, "upon consultation with EPA;" and drafting and sending a summary report of the committee meeting to EPA prior to finalizing the report. SOW at 1-6, J.A. 184-188.[4]

EPA, meanwhile, provided the contractor with a list of acceptable panel members and reserved for itself the authority to approve or disapprove ERG's proposed choices of committee members and committee chair; draft the committee's meeting agenda with the contractor; review the committee members' written comments prior to the committee 's public meeting; and review and provide written comments on draft report of committee meeting prior to finalization of report. SOW at 2-5, J.A. 185-88.[5] In addition, at the July 16, 1997 public meeting of the benzene advisory committee, EPA personnel undertook a dialog with the advisory committee, soliciting and receiving responses to questions of scientific judgment. EPA Rept. of Meeting at 5, 7, 10, 16-17, 22, 24, J.A. 228 at 235, 237, 240, 246-47, 252, 254.

The report of the public meeting with the committee member comments was ultimately finalized and was adopted by EPA.[6]

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[4] The facts reported in this section B are not in dispute. *Compare* Plaintiff Byrd's Proposed Uncontroverted Facts (Jan. 5, 1998) *with* Defendant's Amended Response to Plaintiff's Proposed Uncontroverted Facts (Jan. 23, 1998). *See also* 174 F.3d at 246-47 (reviewing primary elements of EPA's assertion of control over the committee).

[5] EPA also specified that if EPA had substantial comments, the benzene committee would review the modifications to the draft report worked out by EPA and the contractor. SOW at 5, J.A. 185.

[6] *See* EPA, Office of Res. & Dev., Carcinogenic Effects of Benzene: An Update at p. v (EPA/600/P-97/001F, April, 1998) (final document

C. The Proceedings Below

The panel majority in the Court of Appeals, affirming the district court,[7] held that EPA had not "established" or "utilized" the benzene advisory committee for FACA purposes *Byrd v. EPA*, 174 F.3d at 245 (copy in Pet. App. at Section A). It cited *Public Citizen v. Dept. of Justice*, 491 U.S. 440 (1989), for the proposition that "an advisory panel is 'established' by an agency only if it is actually formed by the agency. . . ." 174 F.3d at 245; *see also id.* at 245-46 (citing other D.C. Circuit cases to same effect). Although the D. C. Circuit considered Byrd's identification of EPA's elements of substantial control over the contractor and committee, it stated that analysis of whether an advisory committee has been "established" does not turn on who determines the methodology and operation of the committee, and concluded that ERG, not EPA, had established the committee. *Id.* at 246-47.

In this connection, the panel majority did recognize that "the contract between ERG and EPA afforded EPA significant potential authority in the panel selection process," 174 F.3d at 247. The panel majority held, however, that because EPA had not fully exercised the authorities it had reserved over the benzene committee's activities and because there was "no reason to assume that the threat of an EPA veto affected ERG's panel selections," Dr. Byrd had accordingly

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reflects a consideration of all comments . . . provided by an expert panel at a peer review workshop (July 16, 1997) and comments received during a public review and comment period (June 1997).

[7] The District Court granted the Government's motion for summary judgment and rejected Byrd's motion for partial summary judgment seeking a declaration that EPA had operated the benzene committee in violation of FACA. The District Court held that under *Public Citizen v. Dept. of Justice*, 491 U.S. 440, and the D.C. Circuit's decision in *Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990), a panel set up by a contractor is not a FACA advisory committee *Byrd v. EPA*, Civ. A. No. 97-1923, Mem. & Order at 2-5 (D.D.C. May 1, 1998) (copy at Pet. App. Section B), J.A. 6-9.

not shown that EPA had "established" the benzene committee. *Id.* Judge Williams, dissenting in part, responded that

> The veto power is key. That it was not used in the benzene episode does not much help EPA: not only may EPA exercise it in future applications of the policy, but the contractor was and is quite likely to take the fact of veto power into account in its selection decisions. Assuming that contractors will ignore this fact--as the majority appears to do--seems akin to believing that the President takes no account of senators' opinions when he nominates federal judges.

174 F.3d at 249 (citation omitted).

The D.C. Circuit panel majority also ruled, based on the Supreme Court's "narrow" interpretation of the term "utilized" in *Public Citizen*, that while "'utilized' encompasses a group organized by a nongovernmental entity," this is so only where the group is "nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Id.* at 246 (citing *Food Chem. News v. Young*, 900 F.2d at 332-33). It held that EPA's involvement in the benzene committee did not constitute the requisite strict management. *Id.*

By order dated August 11, 1999, Byrd's petition for rehearing *en banc* (filed June 14, 1999) was denied; Judges Williams and Tatel voted in favor of the petition. (Order in Pet. App. at Section A.)

REASONS FOR GRANTING THE WRIT

I. The Court Should Review a Holding That Vitiates FACA

A. The "Contractor Exemption" is Inconsistent with FACA

Without any warrant in the provisions of FACA, the D.C. Circuit created an exemption that is readily invoked and

provides a clear escape from FACA. FACA contains no such exemption, nor does its legislative history nor do rulings of this Court. *See Byrd v. EPA*, 174 F.2d at 249 (Williams, J., dissenting in part) ("it seems to me inconsistent with the statute's language and intent to exempt from FACA a panel controlled so closely in membership and purpose"). *See* discussion *infra* at 18. Under the broad holding of the D.C. Circuit panel majority, however, an agency that seeks advisory committee advice need only hire a contractor to set up the committee and thus free itself of the FACA responsibilities of accountability to Congress and openness to the public.[8]

At the same time, Congress has confirmed FACA's continuing importance. Notably, it had seen no reason in 25 years to materially amend FACA. Amendments in 1997, modifying two agencies' FACA responsibilities, reiterated Congress' support for FACA and "the public's right to know about the advisors and procedures used to produce technical or policy advice for the government."[9] The Federal Advisory Committee Act Amendments of 1997, Pub. L. 105-153 (Dec. 17, 1997), provide *inter alia* that agencies may not use the advice or recommendations of the National Academy of Sciences unless specific FACA procedural requirements are met (including public notice of meetings and publication of summaries of meetings that are closed). This recent tailored amendment of FACA indicates no legislative support for the wholesale exemption to FACA found by the Court of Appeals.

Exploitation of a "contractor exemption" to FACA is not merely a speculative fear. Why would an agency that needs

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[8] A trade press report of the panel majority decision declares "Peer Review Panel Convened by Contractor Not Subject to FACA, Appeals Court Rules," 23 *Chem. Reg. Rptr. (BNA)* 229-230 (May 7, 1999).

[9] Statement of Rep. Henry W. Waxman (in support of H.R. 2977), 1997 Cong. Reg. at H10581 (Nov. 9, 1997).

outside advice or judgment saddle itself with FACA compliance requirements needlessly? Particularly an agency that might prefer to avoid public scrutiny would not bother with such requirements, nor would agencies that find FACA burdensome. *Cf.*, *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1010 (D.D.C. 1994) (citing "another attempt by the Executive Branch to escape the toils of FACA"). An interest in such avoidance may be a motive in agencies' seeking advice from National Academy of Science committees (which were, until recently, considered exempt from FACA). *E.g NRDC v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998); *Animal Legal Def. Fund v. Shalala*, 104 F.3d 424 D.C.Cir. 1997); *cf.* FACA Amendments of 1997 (prohibiting agency use of National Academy of Science committees absent compliance with openness requirements, reflecting concern over agency use of NAS to escape FACA).

Significantly, the D.C. Circuit recognized that EPA's use of contractors to convene advisory committees was a continuing practice. 174 F.3d at 244 n.4; *id.* at 248. The practice will not cease unless it is ruled violative of FACA.

B. The Decision Compromises the Independence of Scientific Peer Review

The panel majority's decision threatens a second public interest. The advisory committee at issue here was a peer review panel. Peer review is the crucial, independent validator of important scientific judgments. A scientific document or policy that has been independently peer-reviewed has received a seal of approval and can readily withstand subsequent challenge to its merits. Congress has recognized the importance of peer review independence.[10]

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[10] For examples of recent Congressional mandates for independent peer review of scientific technical decisions alone, *see, e.g.*, Sound Scientific Practices Act, H.R. 2639, 106th Cong., 1st Sess. (July 29, 1999) (to establish independent peer review for the review of standards promulgated under Occupation Safety and Health Act); Science Integrity Act, H.R. 574, 106th Cong., 1st Sess. (Feb. 4, 1999) (to require

EPA's Science Advisory Board, which performs such a science-validation function, operates in compliance with FACA. Byrd Decl. at ¶17-18, J.A. 347. Also, at least the Public Health Service, Department of Health and Human Services, regards scientific peer review committees to be subject to FACA. *See* 42 C.F.R. §52h.3 (directing application of FACA to peer review groups reviewing grant applications for research and development projects).

The D.C. Circuit's licensing (1) of EPA's exercise of significant control over the staffing and conduct of a peer review panel and (2) of EPA's ability to ignore other FACA public openness requirements in future cases of controversial, policy-determinative scientific documents, compromises the independence of the institution of peer review.[11] *See also Cargill, Inc. v. U.S.*, 173 F.3d 323, 341 (5th Cir. 1999) ("If FACA has no teeth, the work product of spuriously formed

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independent peer review, available for public comment, of scientific data used in support of Federal regulations); S. 746 (to provide for analysis of major rules) at §625, 106th Cong., 1st Sess. (July 20, 1999) (agencies to obtain external, independent peer reviews, available for public comment, of cost-benefit analyses); H.R. 3160 (to reauthorize Endangered Species Act) at §102, 106th Cong., 1st Sess. (Oct. 27, 1999) (requiring peer review of species listing decisions by technically qualified individuals without financial or scientific conflicts of interest); S. 59 (to require accounting of regulatory costs and benefits) at §§5-6, 106th Cong., 1st Sess. (Jan. 19, 1999) (OMB to obtain independent and external peer review comments on accounting, which would be subject to public comment); H.R. 1074 (to require accounting of regulatory costs and benefits), 106th Cong., 1st Sess. (March 11, 1999) (same); H.R. 1398 (to amend Clean Air Act to prohibit use of certain fuel additives), 106th Cong., 1st Sess. (April 14, 1999) (requiring scientific testing and peer review prior to EPA approval of use of fuel additive).

[11] In this case, EPA's close supervision of committee membership selection resulted in inclusion of a scientist whose earlier contract work for EPA on benzene health effects was part of the documentation that was under review by the committee. Byrd Declaration at 7, ¶22 (Pet. App. Section C), J.A. 348.

advisory groups may obtain political legitimacy that it does not deserve.")

C. The Purported Supreme Court Basis of This Decision Increases Its Influence

The D.C. Circuit's "contractor exemption" cites as its authority the decision in *Public Citizen*. In that case, the Supreme Court sought to resolve difficult separation of powers issues posed by potential extension of FACA to a private (American Bar Association) committee advising the President on qualifications of judicial nominees, an otherwise unreviewable political decision of the President.[12] The Court did not anticipate that its ruling would form the basis of a wholesale "contractor exemption" from FACA. *But cf. Public Citizen*, 491 U.S. at 469-470 (Kennedy, J., concurring) (predicting problems with majority's approach to avoiding separation-of-powers problem, noting that "[r]eluctance to working with the basic meaning of words in a normal manner undermines the legal process").

The *Public Citizen* Court could not have intended to support creation of a gaping loophole excluding from the critical public accountability requirements of FACA exactly the kinds of policy-affecting committees to which Congress enacted FACA to apply. But this foundation to the D.C. Circuit's ruling means that the lower courts, citing the Supreme Court's only FACA decision, will reject any future attempt to challenge agency use of the contractor device. Only the Supreme Court can remedy the damage wrought by the D.C. Circuit's decision.

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[12] In contrast to the kind of advice at issue in *Public Citizen*, the benzene risk assessment and the advisory committee's comments would presumably become a part of the administrative record of any rule ultimately premised on the risk assessment. Such record could be reviewed in court under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

D. The D.C. Circuit's Approval of the Extent of EPA Control Over Committee Advice Conflicts with Public Access Assured by FOIA

This Court has cited the importance of agency control to determining whether particular activities are subject to statutory compliance requirements under sunshine statutes. *E.g.*, *Public Citizen*, 491 U.S. at 457 (ABA committee, as privately formed "rather than at the Federal Government's prompting," receiving no federal funds and "not amenable to strict management of agency officials," not subject to FACA *Forsham v. Harris*, 445 U.S. 169, 181 (1980) ("[r]ecords of a nonagency certainly could become records of an agency as well" under FOIA based on extent of agency control); *Department of Justice v. Tax Analysts*, 492 U.S. 136, 143 (1989) (citing fact that documents were not in control of agency nor entered agency files as ground for holding them beyond FOIA). The D.C. Circuit's undervaluing of EPA's control over the contractor and advisory committee in this case significantly conflicts with this Court's rulings under FACA's sister sunshine statute, the Freedom of Information Act, 5 U.S.C. §§556, *et seq.* ("FOIA"), such that documents that EPA would be required to disclose under FOIA could be denied the public under the "contractor exemption" of FACA.[13]

Specifically, this Court has concluded that restricting FOIA applicability to materials generated internally by an agency itself (as opposed to by others for an agency) would frustrate Congressional intent to provide public access to the information available to agency decisionmaking. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 146 (1989).

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[13] The purpose of FOIA, enacted shortly after FACA, was similar to that of FACA, namely "to open agency action to the light of public scrutiny." *Dept. of Justice v. Reporters Com. For Freedom of Press.* 489 U.S. 749, 772 (1989).

Forsham v. Harris, 445 U.S. 169, posed the issue of whether raw data generated by the recipient of an agency grant constituted "agency records," based on the agency's funding of the research and its right of access to the data. The Court distinguished the generation of data resulting from an agency grant to a private entity for a public purpose, which occurs generally independently of the grant-giving agency, from data generation by an agency contractor for the direct benefit or use of the agency. 445 U.S. at 180. The Court held that grantee-generated data did not constitute "agency records," but noted that "[r]ecords of a nonagency certainly could become records of an agency as well," based on government control. *Id.* at 182.[14]

Forsham's distinction between grantee-based document generation-- independent of agency and for public interest-- and contractor document generation (generally for agency, within agency's control, and hence subject to FOIA), highlights the problem with the D.C. Circuit's decision in *Byrd*. The benzene committee was established directly for EPA and was in fact subject to Agency control. Under FOIA, the public has the right to find out the kinds of advice EPA has received from its advisory groups, including ones run for EPA by contractors. *See, e.g., Burka v. Depart. of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996); *Chicago Trib. Co. v. Dept. of Health & Human Servs.*, 1997 U.S. Dist. LEXIS 2308 at *28 (N.D. Ill., Feb. 28, 1997); *Gilmore v. Dept. of Energy*, 4 F.Supp. 2d 912, 917 (N.D. Cal. 1998) (documents that government owns by contract are "agency records"). Under FACA, however, disclosure of such information could no longer be available.

That is, under the D.C. Circuit's "contractor exemption," EPA could choose not to disclose some or all of the documents considered or produced by one its contractor-led

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[14] *See Tax Analysts*, 492 U.S. at 147 (to limit FOIA application to documents authored by an agency would be incompatible with FOIA's public openness purpose).

advisory committees. *Cf.* FACA § 10 (requiring disclosure of documents "available to or prepared by" advisory committee). *See also Alabama-Tombigbee River Coal. v. Dep't of Interior*, 104 F.3d 424, 430 (11th Cir. 1994) (FACA document disclosure to be contemporaneous with FACA meeting); *Byrd v. EPA*, 174 F.3d at 244 (same)). Documents subject to disclosure under FOIA could be denied the public attending EPA contractor-led advisory committee meetings (as occurred in this case).

The differing results under FOIA and the purported FACA "contractor exemption" conflict with the public openness purpose of these sister sunshine statutes, and the "contractor exemption" underlying the conflict should be rejected.

E. The "Contractor Exemption" Damages APA Review

As the D.C. Circuit recognized regarding the basis of Byrd's standing and his claim of redressability,

> declaratory relief will redress Byrd's injury because it will provide him with this Court's declaration that the agency failed to comply with FACA; and such a declaration will give Byrd "ammunition for [his] attack on the Committee's findings" in subsequent agency proceedings that make use of the Benzene update.

Byrd v. EPA, 174 F.3d at 244 (citation omitted). By contrast, when EPA ultimately promulgates a rule significantly tightening tailpipe benzene emissions of millions of cars and trucks based on the "peer-reviewed" benzene risk assessment, nothing in the rulemaking record will identify (1) the FACA problems with the peer review nor (2) the substantive problems resulting from the undercutting of the ability of Byrd and possibly others to comment (due to denial of access to benzene committee

documents contemporary with the committee meeting).[15] Moreover, the work of EPA's insufficiently open, significantly controlled benzene committee will constitute merely a small element at the bottom of an extensive rulemaking record.

Accordingly, the ability of Byrd or a refiner of benzene to obtain meaningful APA review of the rules ultimately premised on the benzene committee's work --based on that defective work-- is damaged. The ability of the D.C. Circuit meaningfully to review the rulemaking record is likewise damaged; it will see none of the problems with the benzene peer review. *Cf FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (discussing principles of court's authority to act in aid of its future ability to review case); *see Sampson v. Murray*, 415 U.S. 61, 77 (1974) (circumstances depriving court with agency review authority of ability to effectively review agency action would justify judicial action).

F. Absurd Result of D.C. Circuit's Reading of FACA Should be Rejected

It is no casual principle that statutes must be construed in the light of their purpose, and judicial constructions which would lead to absurd results are to be avoided. *E.g Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring). Here, the D.C. Circuit's "contractor exemption" to FACA applicability means that while an agency could not, under the 1997 FACA Amendments, escape FACA accountability and openness requirements in obtaining advisory committee input by using the National Academy of Sciences to establish a committee, it could do so by hiring a different contractor. This result is absurd, and effectively vitiates the public openness purpose of the statute.

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[15] *See* Byrd Decl. at ¶¶ 5-7, 12-13. (Pet. App. at Section C) (citing problems of overestimation of risk to public, at great economic cost, and underestimation of risks to certain worker categories).

G. No Factual Complexity Justifies Reluctance to Resolve This Case

This case involves no dispute over the factual elements of EPA's assertion and reservation of rights over the contractor's and committee's activities. *See* n. 4, *supra* at 5.

If the undisputed level of involvement and control demonstrated by EPA is not sufficient to render the benzene committee an advisory committee, then FACA is a nullity. Agencies need not exercise any more management than occurred here in order to effectively control a committee through a contractor, while at the same time having escaped FACA's compliance requirements.[16]

H. The Court Is Not Likely to Have a Second Chance to Resolve This Issue

The significance of this case results from the likelihood of effective substantial or complete repeal of FACA compliance by the D.C. Circuit decision— that is, the eventual widespread agency use of contracts to set up advisory committees. This case does not involve a conflict between the circuits, presumably because the D.C. Circuit, located at the seat of Federal government, is by far the primary venue of FACA litigation.[17]

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[16] The D.C. Circuit's conclusion that EPA had not "established" the benzene committee relied significantly on the panel majority's factual *presumption*. While the panel majority noted that EPA had reserved "significant potential authority" in the contractor's selection of committee members, and stated that "[t]he result in this case might have been different if EPA had exercised its [veto] authority," it concluded that "there is no reason to assume that the threat of an EPA veto affected [the contractor's] panel selections." 174 F.2d at 247. However, Judge Williams, dissenting, pointed out the palpable weakness of this factual presumption, noting that "Assuming that contractors will ignore this fact. . . seems akin to believing that the President takes no account of senators' opinions when he nominates federal judges." *Id.* at 249 (citation omitted). This is a dispute not of fact but of commonsense.

[17] For the same reason, the present case, together with *Food Chem. News*, are the only cases that have considered agency use of the contractor

At the same time, if the D.C. Circuit's decision stands, this Court is very unlikely to review a similar case, first because the D.C. Circuit has provided a roadmap for how agencies can establish advisory committees without incurring FACA compliance responsibilities. Second, where the primary authority for the D.C. Circuit decision is this Court's only FACA decision, *Public Citizen*, future challenges to contractor-led advisory committees in other circuits will be dismissed, following the path pointed by the D.C. Circuit. Finally, it will be very difficult under the D.C. Circuit's ruiing for a plaintiff to detect violation of FACA in instances where a contractor was used. Agencies could choose to close contractor-led advisory committee meetings and not invite the public. Indeed, complete shams --purportedly contractor-led advisory committees that are in fact agency-established and controlled-- could simply not be detected, particularly where EPA chose to close such a meeting. (In the present case, only by filing suit --because the contractor and EPA denied Byrd advisory committee documents-- and obtaining limited voluntary discovery was the extent of EPA's control of the benzene committee revealed.)[18]

* * *

Accordingly, the Court must, to preserve FACA, reach the present case and decide the question of whether an agency's use of a contractor to set up an advisory committee exempts an agency from FACA compliance requirements.

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device. *See also* 174 F.3d at 249 (citing scant D.C. Cir. case law on "established" and "utilized").

[18] In *Kissinger v. Reporters Comm.*, 445 U.S. 136, 155 n.9 (1980), the Court noted but reserved the issue of FOIA applicability to an agency official's purposeful routing a document out of agency possession in order to evade a FOIA request. Petitioner cannot, based on the constricted discovery process in this case, prove that EPA's use of the contractor device in the case of a significant and controversial peer review was motivated by an attempt to evade FACA, but given the absence of a clear cost savings from the practice, the fact that EPA has FACA-compliant committees that actually provide peer reviews, and the significance of this peer review, the possibility cannot be ignored.

II. The Benzene Advisory Committee Was Subject to FACA

The following discusses the basis for concluding that EPA's benzene advisory committee was subject to FACA, namely that FACA contains no contractor exemption, that EPA's heavy involvement in setting up the benzene advisory committee constitutes "establishment" of the committee, and that given EPA's heavy involvement and use, the committee was likewise "utilized" under FACA.

A. FACA Does Not Contain a "Contractor Exemption"

FACA contains no exemption for agency use of a contractor as its agent for obtaining advice. Nor does FACA's legislative history support the "contractor exemption" the D.C. Circuit approved here. That is, one of the few references to contractor use in the legislative history is the statement that the "Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies *Food Chemical News v. Young*, 900 F.2d at 331 (quoting H.R. Conf. Rep. No. 92-1403, p. 10 (1972)). The first clause means that FACA does not apply to the contractor who sets up an advisory committee for an agency, and it was so applied in *Food Chemical News v. Young*, 900 F.2d 328. That case concerned, in part, the claim that a learned society hired by the Food and Drug Administration to produce a document was itself subject to FACA for using an advisory committee; the D.C. Circuit cited the first clause in exempting that contractor from FACA. *Id.* (distinguishing, for purposes of FACA, contractor from advisory committee).[19]

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[19] To the same effect, *see* H. Rep. No. 92-1017 at 3494 ("The term advisory committee does not include any contractor or consultant hired by an officer or agency of the government, since such contractor would not be a 'committee, board, commission, council . . ., or similar group. . .")

The second prong of the Conference Report language excludes from FACA coverage "advisory committees not directly established by or for such agencies." EPA's central role in the benzene committee's establishment takes the committee out of that exclusion. The benzene committee was directly established by and for EPA.[20]

Finally, the D.C. Circuit's decision in *Food Chemical News v. Young*, 900 F.2d 328, cited by the D.C. Circuit panel majority as additional authority, did not license agency use of contractors to set up advisory committees. That case concerned the claim that an advisory committee organized by the Federation of American Societies for Experimental Biology ("FASEB") in the course of producing a policy document as a contractor to the Food and Drug Administration. The court rejected the claim that the FASEB committee was an advisory committee to FDA subject to FACA, citing the independence of the FASEB committee from FDA:

> The panel was "established" by FASEB, not by FDA. FASEB proposed the panel, and alone selected its members. FASEB also set the panel's agenda, scheduled its meetings, and would have reviewed the panel's work. Similarly, FASEB was the entity that, by contract, directly "utilized" the panel. FASEB is a private organization and government contractor [...]. The panel was to be managed by FASEB; it was "not amenable to [any] management by [FDA] officials," or "by [any semiprivate entity the Federal Government helped bring into being."

900 F.2d at 333 (Ginsburg, R., J.) (citations omitted). By contrast, in the present case, EPA directly involved itself in

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[20] By contrast in the present case, the contractor, ERG "established" the benzene committee only in the most superficial sense: the motive and the establishing actions were undertaken or ordered by EPA.

the selection of committee members, EPA set the committee's agenda, and EPA reviewed the committee's draft final report, having reserved the right to direct changes. Where the FASEB panel was wholly that of the contractor, the benzene committee was that of EPA. In any case, FACA contains no exemption for using a contractor in establishing and utilizing an advisory committee.

B. An Agency That Tasks Contractor to Set Up Advisory Committee and Controls the Setting Up "Establishes" the Committee for FACA Purposes

FACA defines an "advisory committee" to include "any committee, board, commission, council, conference, panel, task force, or other similar group. . .which is. . . established or utilized . . . [by an agency], in the interest of obtaining advice or recommendations...." 5 U.S.C. App. II, §3. The appellate panel majority held that EPA did not "establish" the benzene committee; the contractor did. 174 F.3d at 247. This conclusion exalts form over substance, because notwithstanding EPA's hiring of a contractor, there was no material difference between EPA's relationship with the committee and the relationship it would have had with a committee it set up itself.

Moreover, this Court has not, in *Public Citizen v. Department of Justice*, 491 U.S. 440, identified any such exemption. While the Court in that case did not focus on the "establishment" element of FACA's definition of "advisory committee,"[21] it did distinguish the ABA committee from FACA's intended scope based on the fact that that committee had not at all been established by the Executive; it was in fact established by a private organization, namely the ABA. *E.g.*, 491 U.S. at 457.

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[21] Specifically, "Appellants agree[d] that the ABA Committee was not 'established' by the President or the Justice Department." *Id.* at 452.

The legislative history, moreover, sheds a little additional light. Notably, the Senate bill evolved from defining an "advisory committee" as one that was limited to committees *established* by an agency to a definition that extended to committees that were *established or organized* by agencies. The House-Senate conference in fact settled on an advisory committee definition founded on a "more capacious phrase," 491 U.S. at 461-2, namely *established or utilized.* This definition, in turn, was clearly influenced by the model of Executive Order 11007 (1963). The definition in Executive Order 11007 reached advisory committees -- whether formed by agencies or not-- "during any period when an [advisory committee] is being utilized by a department or agency in the same manner as a Government-formed advisory committee." 491 U.S. at 457. In moving to expand the definition from committees "established" by agencies to ones "established or utilized," Congress was clearly reaching beyond only government-established committees.[22]

In the present case, EPA itself decided on establishment of an advisory committee to provide it advice on exposure risks associated with benzene, and EPA hired the contractor for that purpose. EPA then involved itself in the contractor's choice of committee members and the committee chair; in drafting of the committee's meeting agenda; and in conveying the charge to the committee; and EPA publicly described the benzene committee as its own, with the contractor providing logistical support. 62 Fed. Reg. at 35173, J.A. 214. In contrast to the ABA committee at issue in *Public Citizen*, EPA caused establishment of the benzene committee for its own purposes and directly participated in that establishment. *See Byrd v. EPA*, 174 F.3d at 249 (Williams, J., dissenting) ("an agency 'establish[es]' a panel if it has real control over

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[22] As noted in *Public Citizen*, the report of the Senate bill underlying FACA "manifested a clear intent not to restrict FACA's coverage to advisory committees funded by the Federal Government...." 491 U.S. at 461 (citing S. Rep. No. 92-1098, p 8 (1972)).

its personnel and subject matter at its inception"). Using a contractor as a glove while setting up an advisory committee should not exempt an agency from FACA.

C. EPA "Utilized" the Benzene Committee for Purposes of FACA

There is, to paraphrase, no doubt that the EPA made use of the benzene committee and "thus 'utilize[d]' it in one common sense of the term." *Public Citizen v. DOJ*, 491 U.S. at 452. EPA specifically tasked ERG to set up an advisory committee under EPA's continuing guidance to obtain advice on its benzene risk assessment, EPA employees engaged the advisory committee members in a substantive dialogue about the risk assessment at the committee's public meeting, and EPA ultimately received and reviewed for changes the draft report of the committee's open meeting and incorporated the committee's comments in its benzene risk assessment. Meanwhile, as noted, the Court of Appeals cited indications that using a contractor to procure advisory committee advice was a continuing EPA practice. 174 F.3d at 244 n.4 & 249.

The Court of Appeals held that under *Public Citizen*, an advisory committee cannot be "utilized" for FACA purposes unless it was either the creation of a semi-private public entity or a "group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials'." *Byrd v. EPA*, 174 F.3d at 246. The panel majority noted that the first clause was inapposite and concluded under the latter standard, that Byrd had not shown the benzene committee so amenable to EPA management or control. *Id.*

Public Citizen, however, did not anticipate or address EPA's practice of using a contractor to obtain advisory committee advice without complying with FACA. In fact, the Supreme Court's reasons for holding the ABA committee to be outside of FACA's scope in *Public Citizen* are wholly

absent from the present case. That is, the benzene advisory committee established by EPA

- was not comparably privately formed — it was formed specifically at EPA's prompting, *cf.* 491 U.S. at 457;
- was not at all foreseen by Congress, and thus could not have been implicitly excluded from FACA, as had the ABA committee, *cf. id.*;
- in fact received public funds budgeted by EPA for its compensation (through EPA's contractor), *cf. id.* at 460; and
- was in fact *"utilized [by EPA] in the same manner as a government-formed advisory committee,"* *id.* at 457 (emphasis added).

In addition, applying FACA to EPA's use of the contractor-led advisory committee device does not implicate the separation of powers concerns that tipped the balance in *Public Citizen*, *id.* at 464. Finally, though neither Congress nor the *Public Citizen* panel anticipated the use of EPA's contractor device, the device's implications are certainly within the concerns underlying FACA. The facile creation of advisory groups by contract ignores the accountability Congress sought in advisory committee creation, *see* FACA § 9 (charter requirement),[23] allows flouting of the openness

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[23] While the D.C. Circuit suggested that procurement law could stand in for FACA in controlling agency use of contractors to establish advisory committees, EPA violated procurement law in its management of the contractor in this case and has a troubled record of compliance with procurement law in its use of consultants. EPA, Office of Inspector General, "Improvement Needed in Subcontract Compet. & Oversight" at 56-57 (Audit Rep. E1BMF2-04-373-5100247, Mar. 21, 1995) (citing EPA's directing its prime contractors to subcontract with particular consultants and experts to avoid procurement requirements of OMB Circular A-120). In any case, relegating FACA compliance to

requirements, §10(public disclosure of advisory committee materials), and permits omission of the balance requirements. §5.

Accordingly, it is clear that EPA "utilized" the benzene committee within the intent of Congress, and extending FACA to contractor arrangements that are transparently intended to procure advice for agencies does not implicate the concerns of this Court in exempting the ABA committee in *Public Citizen*.

CONCLUSION

The D.C. Circuit has created a "contractor exemption" that could easily swallow FACA. For the foregoing reasons, notably the significant possibility that the Supreme Court will not have another opportunity to consider the contractor device, Petitioner respectfully requests the Court to grant the writ.

Respectfully submitted

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Date: December 9, 1999

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enforcement of procurement law does not remedy the damage done to FACA by the D.C. Circuit decision.

Section A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL M. BYRD, III, APPELLANT
V.
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, APPELLEE

174 F.3D 239

APRIL 30, 1999, DECIDED

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia. (No. 97cv01923).

DISPOSITION: Affirmed.

COUNSEL: Thomas R. Bartman argued the cause for the appellant. James V. Delong was on brief for the appellant.

Thomas M. Bondy, Attorney, United States Department of Justice, argued the cause for the appellee. Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, United States Attorney, and Mark B. Stern, Attorney, United States Department of Justice, were on brief for the appellee. Alisa B. Klein, Attorney, United States Department of Justice, entered an appearance.

JUDGES: Before: EDWARDS, Chief Judge, WILLIAMS and HENDERSON, Circuit Judges. Opinion for the court filed by Circuit Judge HENDERSON. Separate opinion concurring in part and dissenting in part filed by Circuit Judge WILLIAMS.

OPINION BY: KAREN LECRAFT HENDERSON

OPINION: [*241] KAREN LECRAFT HENDERSON, Circuit Judge: Appellant Daniel M. Byrd seeks reversal of the district court's grant of summary judgment to the Environmental Protection Agency (EPA) on his claim that EPA violated the Federal Advisory Committee Act (FACA),

5 U.S.C. App. II §§ 1-15. Specifically, Byrd contends that a peer review panel convened by an EPA contractor, the Eastern Research Group (ERG), to update EPA's interim benzene report constituted a federal "advisory committee" and therefore its proceedings were governed by FACA, with which it admittedly did not comply. Byrd seeks either reversal and a declaration that the panel's proceedings violated FACA or, alternatively, remand for discovery pursuant to Fed. R. Civ. P. 56(f). EPA counters that Byrd lacks standing, his claim is now moot and he is wrong on the merits. We affirm for the reasons set forth below.

I. BACKGROUND

In 1985, EPA issued an interim report discussing the carcinogenic effects of benzene. By 1996, EPA had prepared a draft update of its interim benzene report (Benzene Update). See Sonawane Decl. PP 2-5, Joint Appendix (JA) 173-75. Before finalizing the Benzene Update, EPA decided to subject it to external peer review.

Under a contractual arrangement with EPA, ERG, a private environmental consulting firm, convened and conducted the peer review. *See id.* P 5, JA 175. The contract required ERG to select a panel of qualified experts, organize a public meeting of the panel to discuss the proposed Benzene Update and compile and submit a report to EPA summarizing the panel's assessment. See Statement of Work at 1-7, JA 184-90; Work Plan for Work Assignment No. 0-5 Contract No. 68-C6-0041, Expert Panel Peer Review of Benzene Risk Assessment Update (May 14, 1997) [hereinafter Work Plan], JA 199-204. In addition, the contract specified that EPA was to pay ERG a fixed sum and that ERG was to compensate the panel members. *See* Work Plan, JA 201. The contract also allowed EPA to determine the issues for the panel to evaluate and to comment in writing on ERG's draft final report. *See* Statement of Work at 5, JA 188.

Pursuant to the contract, EPA submitted to ERG for its consideration a list of twenty-four scientists who, in EPA's view, possessed the professional credentials necessary to serve on the

peer review panel. *See* JA 192-93 (list of potential panelists). From the list, ERG selected four individuals to be panelists. ERG also selected two panelists from its own database of consultants. *See* EPA Mem. from Barbara Cook to Billy Oden, Re: Work Plan/Cost Estimate Approval, ERG Contract No. 68-C6-0041, WA 0-5 (June 9, 1997) [hereinafter 6/9/97 Mem.], JA 220; 6/13/97 Letter, JA 221. EPA suggested no modifications to the list of panel members selected by ERG. *See* 6/9/97 Mem., JA 220; 6/13/97 Letter, JA 221; see also Statement of Work at 2, JA 185 (stating that "final approval of selected experts will be made by EPA").

On June 27, 1997 EPA held a teleconference with ERG and the selected panelists, during which the panelists were instructed to prepare pre-meeting comments on the draft Benzene Update "specifically addressing a series of questions that [EPA] had provided" to ERG. Sonawane Decl. P 7, JA 176. The panelists circulated their pre-meeting notes among themselves and provided a copy to EPA. *See id.* P 8, JA 176. On June 30, 1997 EPA gave public notice in the Federal Register of the panel's scheduled meeting. See Draft Carcinogenic Effects of Benzene: An Update, *62 Fed. Reg. 35,172, 35,172-73 (1997)*, JA 213-14. The Federal Register notice explained the purpose of the meeting and noted that the draft was publicly available on the [*242] Internet or in writing from EPA. The notice also stated that ERG was to provide "logistical support for the workshop" and that interested persons could attend and participate in the meeting and advised that written comments could be submitted to EPA during a 60-day period ending August 29, 1997. *62 Fed. Reg. at 35,173*, JA 214.

The panel meeting took place as scheduled on July 16, 1997. "The meeting was managed by ERG. Although several EPA employees who had been involved in developing the draft benzene update attended the meeting and effectively participated . . . , no EPA employee or officer supervised the conduct of the

meeting."[1] Byrd Decl. P 8, JA 345. Byrd, a self-employed "consulting toxicologist and risk assessor," *id.* P 2, JA 342, also attended after "learning about the [July 16, 1997] meeting through EPA's [public notice] in the Federal Register."[2] *Id.* P 4, JA 344. Byrd participated in the meeting, twice expressing his views to the panel and others present. In addition, because of his concerns regarding the assumptions underlying the Benzene Update and his desire to be more informed, Byrd had earlier sought a copy of the panel members' pre-meeting notes but had been rebuffed three times. *See id.* PP 11, 13-15, JA 345-47; Sonawane Decl. PP 12-13, JA 177-78. Byrd made no additional attempt at the meeting to secure the notes. After the meeting, Byrd timely submitted written comments to EPA on the draft Benzene Update. *See* Sonawane Decl. P 15, JA 178.

On August 22, 1997, Byrd filed this action alleging that the expert panel assembled by ERG was an "advisory committee" within the meaning of FACA[3]. Byrd sought both declaratory relief and a use injunction barring EPA from using the panel's work product. *See* Compl. P 16. One month later, ERG submitted to EPA its final report, including its analysis of the

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[1] David Bayless, an EPA employee, opened the meeting by introducing the panel and repeating the questions EPA had posed to the panel. See Panel Report at 3-4, JA 233-34; Byrd Decl. P 10, JA 345.

[2] Byrd "frequently attends, and plans to continue attending, meetings sponsored by [EPA] about the toxicology and risks of specific air pollutants." Byrd Decl. P 2, JA 342.

[3] If the benzene panel was in fact an "advisory committee" subject to FACA as defined by 5 U.S.C. App. II § 3(2), both parties agree that the panel functioned in violation of FACA. Among other things, "the records, . . . working papers . . . or other documents which were made available to . . . each advisory committee shall be available for public inspection and copying", FACA, 5 U.S.C. App. II § 10(b), and "detailed minutes of each meeting of each advisory committee shall be kept." *Id.* § 10(c). FACA also stipulates that "there shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee." *Id.* § 10(e). "No advisory committee shall conduct any meeting in the absence of that officer or employee." *Id.*

draft Benzene Update. *See* Sonawane Decl. P 14, JA 178; Schalk Decl. P 8, JA 219; Panel Report, JA 228-329. EPA "did not participate in ERG's preparation of the final report." Sonawane Decl. P 14, JA 178.

On October 10, 1997, almost three months after the meeting, Byrd's counsel wrote a letter to EPA's FOIA officer requesting a copy of the panel's pre-meeting notes. See Letter from Thomas R. Bartman to Jeralene Green, EPA, Re: Written Comments Prepared for or by Members of the Advisory Committee Convened July 16, 1997 (Oct. 10, 1997), JA 216. EPA provided all of the requested notes and invited Byrd to submit additional comments. See Letter from William H. Farland, Director, Office of Research and Development, to Thomas R. Bartman, Re: FOIA Request HQ-Rin-00186-98 (Nov. 14, 1997), JA 215. Byrd, however, declined to do so. EPA then moved to dismiss Byrd's complaint or, alternatively, for summary judgment. EPA challenged Byrd's standing and, on the merits, argued that the peer review panel assembled by ERG was not an "advisory committee" under [*243] FACA. The district court ruled in favor of EPA. Byrd v. EPA, C.A. No. 97-1923 (D.D.C. May 1, 1998) (Mem. and Order) [hereinafter Mem. & Order], JA 5-9. Although it "assumed without deciding" that Byrd had standing, Mem. & Order at 2-3 n.1, JA 6-7, the district court held that a panel convened by a private contractor is not a FACA "advisory committee" as that term has been construed by the Supreme Court and by this Court. See id. at 2-5, JA 6-9 (citing *Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989)*, and *Food Chem. News v. Young, 283 U.S. App. D.C. 344, 900 F.2d 328* (D.C. Cir.), *cert. denied, 498 U.S. 846, 112 L. Ed. 2d 99, 111 S. Ct. 132 (1990)).* Byrd timely filed his appeal.

II. DISCUSSION

A. Standing

EPA first attacks Byrd's standing to bring this action. Although the district court "assumed without deciding" Byrd's standing, Mem. & Order at 2-3 n.1, JA 6-7, its

approach is incorrect in light of the Supreme Court's recent holding in *Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*, that standing is a "threshold jurisdictional question" that cannot be assumed in resolving litigation. *118 S. Ct. at 1016.* "Moreover, because Article III standing is always an indispensable element of the plaintiff's case, neither we nor the Congress can dispense with the requirement--even if its application renders a FACA violation irremediable in a particular case." *Natural Resources Defense Council v. Pena, 331 U.S. App. D.C. 198, 147 F.3d 1012, 1020 (D.C. Cir. 1998)* (NRDC); see also *Federal Express Corp. v. Air Line Pilots Ass'n, 314 U.S. App. D.C. 267, 67 F.3d 961, 963 (D.C. Cir. 1995)* ("The requirement of a case or controversy is no less strict when a party is seeking a declaratory judgment than for any other relief."). Therefore, we must decide EPA's challenge to Byrd's standing.

The Steel Company holding requires us to focus on three elements:

> First and foremost, there must be alleged (and ultimately proven) an injury in fact--a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical.... Second, there must be causation--a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.... And third, there must be redressability--a likelihood that the requested relief will redress the alleged injury.... This triad of injury-in-fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

118 S. Ct. at 1016-17 (quotations and citations omitted).

According to the Supreme Court, a refusal to provide information to which one is entitled under FACA constitutes a

cognizable injury sufficient to establish Article III standing. See *Public Citizen, 491 U.S. at 449* ("refusal to permit appellants to scrutinize [committee's] activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue"). By denying Byrd timely access to the panel's written comments and pre-meeting notes, EPA directly caused his informational injury. See *Byrd Decl. at 6 P 15; Sonawane Decl. at 5-6 P 13,* JA 177-78; Panel Report at 30, JA 260. EPA therefore can make no serious challenge to the injury and causation elements of Byrd's standing. See *Food Chem. News v. Department of Health & Human Servs., 299 U.S. App. D.C. 25, 980 F.2d 1468, 1469 (D.C. Cir. 1992)* ("Whenever practicable, all [Federal Advisory Committee] materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.") (emphasis added).

EPA does question whether Byrd can meet the redressability prong. It first contends that declaratory relief will no [*244] longer redress Byrd's inability to obtain timely access to the panel's documents because they have since been made available and the panel has completed its work and been disbanded. See Appellee's Br. at 13, 21-27; *Sonawane Decl. at 6 P 14,* JA 178; Schalk Decl. P 8, JA 219. EPA also stresses that declaratory relief will not prevent additional informational injuries resulting from any future noncompliance with FACA. [See Appellee's Br. at 21-27.] If Byrd had simply complained that EPA failed to release the documents he requested, his alleged injury could not be redressed by any action of this Court because he ultimately received the materials. Byrd's injury, however, resulted from EPA's failure to furnish him with the documents until long after they would have been of any use to him. Thus, contrary to EPA's contentions, declaratory relief will redress Byrd's injury because it will provide him with this Court's declaration that the agency failed to comply with FACA; and such a declaration will give Byrd "ammunition for [his] attack on the Committee's findings" in subsequent agency proceedings that make use of the Benzene Update. *NRDC,*

147 F.3d at 1026 n.6. Such an attack might also prompt, in view of the importance placed on the Benzene Update by EPA, see Statement of Work at 1 (contracting with ERG to conduct "category 1 peer review of the draft benzene document"), JA 184; *Sonawane Decl. at 3 P 4* ("'Category 1' peer review is used when major scientific or technical work products are being generated...."), JA 175, additional, FACA-compliant peer review on the issue. Moreover, declaratory relief might well cause EPA to reevaluate and change peer review practices not in conformity with FACA. Accordingly, we conclude Byrd has standing to maintain his action.

B. Mootness

EPA also contends that Byrd's request for declaratory relief is moot because it has already given him the panel's pre-meeting notes and it is not engaged in any ongoing violation of FACA. Nevertheless, "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot'." *Calderon v. Moore, 518 U.S. 149, 150, 135 L. Ed. 2d 453, 116 S. Ct. 2066 (1996)* (quoting *Church of Scientology v. United States, 506 U.S. 9, 13, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992)).* Because Byrd's injury resulted not only from EPA's failure to provide him materials but also from the tardiness of their eventual release, his injury would be mooted if EPA convened another panel to review the Benzene Update in compliance with FACA and provided him with all panel documents either before or at the meeting. Because EPA has not taken such action, declaratory relief would afford Byrd some relief and prevent his action from becoming moot.

Byrd also argues that EPA has a policy of hiring contractors to conduct peer reviews without following FACA requirements. See *Payne Enters., Inc. v. United States, 267 U.S. App. D.C. 63, 837 F.2d 486, 491 (D.C. Cir. 1988)* ("So long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific

documents that prompted the suit.").[4] Thus, the tardy release of the documents does not render the case moot because Byrd's challenge to the policy remains. See *United States v. W.T. Grant Co., 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)* ("Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a [*245] dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.") (citations omitted).

C. The Merits

FACA defines an "advisory committee" as

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government.

5 U.S.C. App. II, § 3(2) (emphasis added). Because EPA did not "establish" nor did it "utilize" the panel within the meaning of section 3(2) of FACA, we affirm the district

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[4] Indeed, counsel for EPA conceded at oral argument that peer review meetings conducted by contractors without following FACA might occur in the future. See Tr. at 14-30, *Byrd v. EPA, 174 F.3d 239 (D.C. Cir. 1999).*

court's grant of summary judgment to EPA.[5] The district court treated EPA's motion for dismissal and summary judgment as a motion for summary judgment and on that basis granted the motion. See Mem. & Order at 2, JA 6.

Relying on legislative history, Byrd suggests that "established" and "utilized" should be construed "in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement ... to obtain advice and information, such group is covered by [FACA]." Appellant's Br. at 11 (quoting S. Rep. No. 92-1098, reprinted in V. McMurty, Fed. Advisory Comm. Act (Pub. L. 92-463), Source Book: Legislative History, Texts, and Other Documents at 158 (Cong. Res. Serv. 1978)). The Supreme Court, however, in *Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989),* squarely rejected an expansive interpretation of the words, reading "established" and "utilized" narrowly to prevent FACA from sweeping more broadly than the Congress intended. See *491 U.S. at 452, 461* (finding "utilized" a "wooly verb" and declining to adopt dictionary meanings of "established" and "utilized" in FACA); see also *Animal Legal Defense Fund v. Shalala, 322 U.S. App. D.C. 381, 104 F.3d 424, 427* (D.C. Cir.) (noting "the term 'utilized' was given a very narrow interpretation by the Supreme Court") (ALDF), cert. denied sub nom., *National Academy of Sciences v. Animal Legal Defense, 522 U.S. 949, 139 L. Ed. 2d 285, 118 S. Ct. 367 (1997).* In addition, the Court indicated that an advisory panel is "established" by an

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[5] We review the district court's grant of summary judgment de novo and sustain the decision below if "there is no genuine issue of material fact and the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c); see also *Doe v. Gates, 299 U.S. App. D.C. 114, 981 F.2d 1316, 1322* (D.C. Cir.), cert. denied, *510 U.S. 928 (1993).* We view the evidence in the light most favorable to the nonmoving party and ask "whether any reasonable jury could find in its favor." *Harbor Ins. Co. v. Schnabel Found. Co., 292 U.S. App. D.C. 56, 946 F.2d 930, 935 (D.C. Cir. 1991).*

agency only if it is actually formed by the agency, see *491 U.S. at 452, 456-57,* and "utilized" by an agency only if it is "amenable to ... strict management by agency officials," *id. at 457-58.* The Court, therefore, held FACA inapplicable to the American Bar Association Standing Committee on the Federal Judiciary, rejecting the argument that that committee had to comply with FACA simply because the Department of Justice regularly sought its input regarding judicial nominees. See *id. at 452-67.*

We have similarly interpreted "established" and "utilized." For example, in *Food Chemical News v. Young, 283 U.S. App. D.C. 344, 900 F.2d 328* (D.C. Cir.) cert. denied, *498 U.S. 846, 112 L. Ed. 2d 99, 111 S. Ct. 132 (1990),* we [*246] held that a panel assembled by the Federation of American Societies for Experimental Biologies (FASEB) pursuant to a formal contract to advise the Food and Drug Administration (FDA) on food safety was not an advisory committee subject to FACA. In so holding, we explained that " 'established' indicates 'a Government-formed advisory committee,' while 'utilized' encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials'." *900 F.2d at 332-33* (quoting *Public Citizen, 109 S. Ct. 2558 at 2568, 2570)* (footnote omitted). We have interpreted "utilized" to encompass "management ... 'by [any] semiprivate entity the Federal Government helped bring into being.'" *900 F.2d at 333* (quoting *Public Citizen, 109 S. Ct. at 2571)* (alteration original); see also *ALDF, 104 F.3d at 427* (noting Supreme Court and this Circuit have adopted " 'management and control' test to determine whether a committee not established by a government agency is nevertheless 'utilized' "). This "second prong" of Food Chemical New's "utilized" standard is inapplicable here because EPA is a governmental agency and ERG is not an entity the government had a role in creating. Thus, contrary to the broad standard suggested by Byrd, "the utilized test is a stringent standard, denoting 'something along the lines of actual management or control of the advisory committee.' "

ALDF, 104 F.3d at 430 (quoting *Washington Legal Found. v. Sentencing Comm'n, 305 U.S. App. D.C. 93, 17 F.3d 1446, 1450 (D.C. Cir. 1994))* (emphasis original). Indeed, this Court has held that participation by an agency or even an agency's "significant influence" over a committee's deliberations does not qualify as management and control such that the committee is utilized by the agency under FACA. See *Washington Legal Found., 17 F.3d at 1451.*

Although this Court has held that an agency "establishes" a committee only if the agency forms the committee, see *Food Chem. News, 900 F.2d at 332,* Byrd contends that EPA "effectively created" the panel by "conceiving of the need for" it and implementing it by hiring ERG to handle the logistics. Appellant's Br. at 16-17 (noting EPA's presentation of panel as its own in Federal Register notice and at public meeting). According to Byrd, EPA's actions are unlike those of the FDA in Food Chemical News in that, there, the contractor (not the agency) "proposed using ad hoc groups of knowledgeable experts as a means of carrying out the contract." *Id.* at 13 (quoting Br. of Resp't in Opp'n, Food Chem. News, No. 90-23 (in Supreme Ct. on pet. for writ of cert.)). But our analysis of whether an advisory committee has been "established" does not turn on a determination of who determines the methodology or operation of the peer review. Notably, the contractors in both Food Chemical News and here received a "task order" or a "work assignment" from the relevant agency defining the objective, the method and the scope of the studies to be performed. See *Food Chem. News, 900 F.2d at 330;* Statement of Work at 1-7, JA 184-90; Work Plan, JA 199-204. Moreover, because ERG selected the membership of the benzene panel, see 6/9/97 Mem., JA 220; 6/13/97 Letter, JA 221, Byrd cannot show that it was " 'a Government-formed advisory committee' "as required by our narrow interpretation of "established." *Food Chem. News, 900 F.2d at 332* (quoting *Public Citizen, 109 S. Ct. 2558 at 2570).* Byrd nevertheless argues that EPA established the panel because it retained the power to approve ERG's panel member selections. Although

EPA provided a list of suggested panel members to ERG, ERG was not required to select its members from that list and two of the panel members were not on the EPA list.[6] See JA 192-93 (list of potential panelists); [*247] Work Plan, JA 201; 6/9/97 Mem., JA 220; 6/13/97 Letter, JA 221; Panel Report App. A, JA 275-76. Moreover, EPA approved ERG's panel member selections without changes. See Sonawane Decl. P 6, JA 176; 6/9/97 Mem., JA 220; 6/13/97 Letter, JA 221. Finally, ERG, not EPA, paid the panelists from its own funds. See Schalk Decl. P 4, JA 218. Although the contract between ERG and EPA afforded EPA significant potential authority in the panel selection process, EPA never fully exercised it. And there is no reason to assume that the threat of an EPA veto affected ERG's panel selections. The result in this case might have been different if EPA had exercised its authority. The record, however, belies any claim that EPA in fact "established" the panel as required by FACA. The statute describes a panel that "is ... established," 5 U.S.C. App. II, § 3(2), not one that could have been established by a government agency. Accordingly, EPA did not establish the benzene panel within the meaning of FACA.

Byrd also contends that EPA "utilized" the benzene panel because it exercised much more control over it than the agencies in Food Chemical News and Washington Legal Foundation exercised over the committees at issue in those cases.[7] See Appellant's Br. at 14-15 (asserting EPA provided

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[6] After consulting with EPA, see Statement of Work at 1, JA 184, ERG also designated the panel's chairman. See Sonawane Decl. at 5, JA 177; Schalk Decl., JA 218; 6/13/97 Letter, JA 221; Panel Report App. A, JA 275-76.

[7] Although Byrd asserts that EPA exerted greater influence on the benzene panel than did the Justice Department on the Sentencing Commission's Advisory Group in Washington Legal Foundation, see Reply Br. at 4-5, his assertion is debatable. In Washington Legal Foundation, the agency placed its own employees on the panel. See *17 F.3d at 1450-51.* And even with agency employees on the panel, this

list of experts from which ERG was to select panel, reserved final authority to approve composition of panel, consulted with ERG on choice of chairman and agenda, presented charge to panel in pre-meeting conference call and reserved right to make written comments on ERG draft report). But even assuming EPA exercised more influence here than did the FDA or the DOJ in relation to their committees, EPA did not manage and control the benzene panel within FACA's scope, keeping in mind that "the utilized test is a stringent standard, denoting 'something along the lines of actual management or control of the advisory committee.' " *ALDF, 104 F.3d at 430* (quoting *Washington Legal Found., 17 F.3d 1446 at 1450)* (emphasis original)). As we held in Washington Legal Foundation, even "significant" influence does not represent the level of control necessary to establish that a government agency "utilized" an advisory panel. 17 F.3d at 1451 ("But influence is not control.").

Contrary to Byrd's contention, the record shows that ERG in fact actually managed and controlled the selection of the panel's membership. See Mem. & Order at 4 n.2, 5; Sonawane Decl. at 4, JA 176; 6/9/97 Mem., JA 220; 6/13/97 Letter, JA 221. Moreover, as even Byrd admits,

> The [panel's July 16, 1997 public] meeting was managed by a contractor, ERG. Although several EPA employees who had been involved in developing the draft benzene update attended the meeting and effectively participated ..., no EPA employee or officer supervised the conduct of the meeting.

Byrd Decl. P 8, JA 345; see Schalk Decl. P 6, JA 219. Finally, ERG, rather than EPA, prepared the report of the panel's proceedings. See Statement of Work at 5, JA 188; Work Plan, JA 204. Although the contract authorized EPA to receive and comment on the draft report before it was finalized, the district court found "no evidence that EPA's

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Court nonetheless held that their influence did not meet the management and control level needed to trigger FACA. See id. at 1451.

input, if any, resulted in changes being made to the final Expert Panel Report." Mem. & Order at 4 n.2, JA 8; see Sonawane Decl. P 14, JA 178 (EPA "did not participate in ERG's preparation of the final report."). Because our decision is based on what EPA in fact did, rather than on what it could have done [*248] under its contract with ERG, we conclude that EPA's actions regarding the benzene panel do not constitute "actual management and control." *ALDF, 104 F.3d at 430; Washington Legal Found., 17 F.3d at 1450.* Accordingly, the district court correctly determined that the benzene panel was not subject to the constraints of FACA because EPA neither "utilized" nor "established" it. For the foregoing reasons, the district court's grant of summary judgment to the Environmental Protection Agency is Affirmed.[8]

DISSENT BY: WILLIAMS (In Part)

DISSENT: WILLIAMS, Circuit Judge, concurring in part and dissenting in part: I agree with the majority that we have

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[8] Byrd alternatively sought remand for discovery pursuant to Fed. R. Civ. P. 56(f) (allowing discovery before summary judgment if "it appears from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party opposition."). See Decl. of Daniel M. Byrd Pursuant to Rule 56(f), JA 350-51. Byrd had to show what facts he intended to discover that would create a triable issue and why he could not produce them in opposition to the motion. See *Hotel & Restaurant Employees Union, Local 25, et al. v. Attorney Gen. of the United States, 256 U.S. App. D.C. 227, 804 F.2d 1256, 1259 (D.C. Cir. 1986).* "It is well settled that conclusory allegations unsupported by factual data will not create a triable issue of fact." *Exxon Corp. v. FTC, 213 U.S. App. D.C. 356, 663 F.2d 120, 126-27 (D.C. Cir. 1980)* (quotation omitted). Byrd merely alleged that "there may well be knowledge on the part of EPA employees or undisclosed documents identifying additional contacts between EPA and the peer panel members," Rule 56(f) *Decl. at 1-2 P 3,* JA 350-51, a plainly conclusionary assertion without any supporting facts. The district court did not abuse its discretion in denying Byrd discovery before granting EPA's summary judgment motion. See *Exxon Corp., 663 F.2d at 126* (Rule 56(f) ruling reviewed for abuse of discretion).

jurisdiction, albeit on a different theory. On the merits, however, though the case is close, I would reverse.

Jurisdiction rests, I think, entirely on EPA's policy of using contractors to do peer reviews of risk assessments under arrangements like those involved in the Benzene Update that triggered this suit. Because Byrd is a regular participant in risk assessment panels, the threat of future injury from the policy is likely and imminent enough to justify standing. Jurisdiction based on the policy rather than the benzene episode suffers no mootness problem: EPA never claimed it would back away from the alleged policy; indeed, counsel at oral argument more or less admitted that the procedures used for benzene represented EPA's ongoing policy.

Unlike the future informational injuries that will flow from EPA's refusal to apply FACA to its contractors' consultative process, Byrd's injury from EPA's applying that view to the Benzene Update appears irredressable. His claim to the documents, of course, is mooted by EPA's FOIA officer's releasing them to him. And I do not see how a mere declaration that he should have had them at the time of the meeting constitutes redress for that loss. The majority suggests that a declaration would help Byrd attack this committee's findings on benzene if EPA wishes to use them in some future proceeding. Perhaps this provides standing for one claiming threatened injury-in-fact from the outcome of this future proceeding, but Byrd made no such claim. Further, such a declaration would seem a telling weapon for Byrd in a hypothetical future proceeding only if he asserted that the documents belatedly turned over enabled him to poke a hole in the substance of the peer review, a hole that he was unable to perceive on a timely basis because of EPA's original refusal to deliver them. But he has identified no such gap.

Nor do I think *NRDC v. Pena, 331 U.S. App. D.C. 198, 147 F.3d 1012, 1026 n.6 (D.C. Cir. 1998),* see Maj. Op. at 7-8, extended "informational injury" so far. That footnote merely observed that denying an injunction against future use of findings from a FACA- defective proceeding would not

render FACA entirely [*249] toothless. One such tooth may be declaratory relief, and its utility in some cases may depend on the winner's being able to use it to delegitimate such findings. But nothing in Pena suggested that the prospect of securing such a benefit from the court could alone support standing as a general matter. The majority's language extending the "informational injury" redressable under FACA appears to assume that a highly theoretical injury is adequate for standing; the language is unnecessary to jurisdiction here.

On the merits, I believe that FACA governs panels established under the challenged policy. Our precedent on this language is rather thin, but appears to say that an agency "establishes" a panel if it has real control over its personnel and subject matter at its inception. Thus in *Food Chemical News v. Young, 283 U.S. App. D.C. 344, 900 F.2d 328, 333 (D.C. Cir. 1990),* we said that the agency had not "established" the panel because the contractor "proposed" it, "alone selected its members," "set the panel's agenda," "scheduled its meetings," and "would have reviewed the panel's work." Here EPA proposes the use of a panel, submits an initial list of suggested members to the contractor, retains veto power over the final membership, and sets the panel's agenda. (The procedure used for the Benzene Update is evidently representative of EPA's practice.) The veto power is key. That it was not used in the benzene episode does not much help EPA: not only may EPA exercise it in future applications of the policy, but the contractor was and is quite likely to take the fact of veto power into account in its selection decisions. Assuming that contractors will ignore this fact--as the majority appears to do, see Maj. Op. at 13--seems akin to believing that the President takes no account of senators' opinions when he nominates federal judges.

Although the issue of whether EPA "established" the panel is certainly a close one, it seems to me inconsistent with the statute's language and intent to exempt from FACA a panel controlled so closely in membership and purpose.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998
97cv01923

United States Court of Appeals for the
District of Columbia Circuit
Filed
August 11, 1999
Clerk

Daniel Byrd, *d/b/a* Consultants in Toxicology,
Risk Assessment and Product Safety, Appellant

v.

Environmental Protection Agency, Appellee

No. 98-5180

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellant's petition for rehearing en blanc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By: /s/_____
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams and Tatel would grant the petition.
Circuit Judge Wald did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Daniel Byrd, *d/b/a* Consultants in Toxicology,
Risk Assessment and Product Safety, Appellant

v.

Environmental Protection Agency, Appellee

No. 98-5180

BEFORE: Edwards, Chief Judge; Williams and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 14, 1999, it is **ORDERED** that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams would grant the petition for rehearing.

Section B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BYRD, Ph.D., d/b/a
Consultants in Toxicology, Risk Assessment,
and Product Safety,
Plaintiff,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Defendant.

File No. C.A. No. 97-1923 (TPJ)

Filed
May 1, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

Thomas Penfield Jackson
U.S. District Judge

MEMORANDUM AND ORDER

Plaintiff Daniel M. Byrd, a private "consulting toxicologist and risk assessor" who advises clients on scientific issues within his expertise, has brought this action against defendant U.S. Environmental Protection Agency ("EPA") for declaratory and injunctive relief. At issue is a report prepared by EPA concerning the carcinogenic effects of benzene (hereinafter, "*Benzene Update*"), certain conclusions of which Dr. Byrd regards to be of questionable-scientific merit.

It appears that *Benzene Update* was the subject of an evaluation in July, 1997, by a peer review panel convened by Eastern Research Group ("ERG"), a private consulting firm, pursuant to a contract with EPA. Although not a panelist

himself, Dr. Byrd attended the single public meeting of the panel, but did so without benefit of having been able to read the "pre-meeting comments" the panelists had exchanged with one another. The panel's final report, prepared under the auspices of the private consulting firm, will presumably figure, along with *Benzene Update*, in further EPA proceedings to regulate the industrial emissions of benzene under the Clean Air Act, 42 U.S.C. § 7403 (d) (2) (C).

Plaintiff Byrd contends that the peer review panel convened by ERG was, in fact, a federal "advisory committee," and that, as such, its proceedings were governed by the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II §§ 1-15, with which it admittedly did not comply. In consequence, Byrd asserts in Count I of his complaint that he is entitled to judgment declaring the proceedings to have been conducted in violation of FACA. In Count II Byrd prays for an injunction against further consideration by EPA of a reassessment of benzene emission standards utilizing *Benzene Update* until it has reconvened a reviewing panel in compliance with FACA.

The FDA has moved for summary judgment of dismissal of Byrd's complaint on multiple grounds. The Court will grant the motion on the sole ground that, by controlling D.C. Circuit precedent, the peer-review panel is not to be deemed a federal "advisory committee" under, and subject to the requirements of, FACA. *See Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990) (citing and following *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989)).[1]

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[1] Byrd's interest in *Benzene Update*, so far as is shown, appears to be that of a scientifically aware citizen concerned that EPA act upon sound scientific premises. Because the Court concludes that amendment of the complaint to add plaintiffs who might have superior Article III standing credentials would be fruitless, given the *Food Chemical News* precedent's dispositive effect on the merits, the Court assumes without deciding that

As the parties are aware, FACA affords significant public access to and participatory rights in the proceedings of conclaves of private-sector consultants assembled to assist government agencies in discharging their missions when they are convened as federal "advisory committees." Salutary as its effects may be in some contexts, in others FACA has proved to be inhibiting, cumbersome, and inefficient. The *Food Chemical News* case gave judicial approval to a method of securing private sector expertise for the benefit of government without requiring observance of the formalities required by FACA in circumstances in which the interaction between the government officials and their private-sector advisors was likely to be neither collusive nor wasteful.

In *Food Chemical News* the D.C. Circuit held that a panel of experts assembled pursuant to a formal contract to advise the Food and Drug Administration ("FDA") on food safety and quality matters was not an "advisory committee" subject to the FACA protocol. The advice submitted pursuant to the contract was the work product of the private-sector contractor, a consortium of professional societies, and was solicited, produced, and paid for in accordance with federal procurement regulations. As in the instant case, the contractor in *Food Chemical News* convened a panel of experts and wrote the final report, making such use of the panelists' conclusions as the contractor itself decided were scientifically significant.

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plaintiff Byrd has standing to maintain this action alone. *See Public Citizen*, 491 u.s. at 449-50.

EPA also contends this controversy is moot because plaintiff has now been furnished with copies of the "pre -meeting comments" albeit after the meeting, and has had opportunity to submit his own comments to EPA directly as a member of the public on *Benzene Update*. However, if Dr. Byrd has standing to invoke FACA, he was entitled to do so contemporaneously with the meeting of the allegedly *ultra vires* "advisory committee." Supplying him after the fact with information he might have made use of earlier does not render his claim moot. *Alabama-Tombigbee River Coalition v. Department of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994).

Dr. Byrd attempts to distinguish the *Food Chemical News* case by suggesting that the EPA, unlike FDA, exerted (or at least reserved authority to exert) considerably greater control over the efforts of and the results generated by the panel of experts examining *Benzene Update* than had the FDA with respect to the advice it received pursuant to its contract, but his hypothesis is not supported by the record.[2] Both the FDA and EPA contractors received a "task order" or "work assignment" defining the objective and scope of the studies they were to perform. (Ex. 3 to Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mot.").) Thereafter both contractors exercised their own discretion to select the experts to comprise the panels, (Sonawane Decl., Ex. I to Def.'s Mot. ¶ 6; Schalk Decl., Ex. 8 to Def.'s Mot. ¶4), paid them from their own funds, (Schalk Decl. ¶4), appointed the presiding officers when the panels actually met, (Sonawane Decl. ¶11; Schalk Decl. ¶5), and exercised independent editorial judgment as to the contents of their final reports to their respective employing agencies. (Sonawane Decl. ¶14; Schalk Decl. ¶8.) With the exception of the fact that the FDA's contractor was a consortium of private non-profit organizations (which was nevertheless paid for its work), whereas EPA's contractor was a for-profit commercial firm, the two projects appear to have been accomplished by identical processes, and neither therefore was subject to FACA.

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[2] Although the Work Assignment written by EPA, provided that the "Contractor shall select 6 panelists from a universal list provided by [EPA] " and that " [f] inal approval of selected experts will be made by EPA under Work Plan approval," (Ex. 3 to Def. 's Mot. at 2), the Work Plan submitted to EPA by ERG provided that the panel was to be selected from EPA's universal list and "from a list generated from ERG'S consultant database." (Ex. 4 to Def. 's Mot. at 4 (Task 2) .) EPA did not actually make any changes to the panelists ERG selected. (Sonawane Decl. 116.) And, although EPA was entitled to "provide written comments on the draft Expert Panel Report to the Contractor who will discuss the comments received from the panelists on the draft report with [EPA] before finalizing the Expert Panel report," (Ex. 3 to Def .'s Mot. at 5; Ex. 4 to Def .'s Mot. at 7 (Task 5)), there is no evidence that EPA's input, if any, resulted in changes being made to the final Expert Panel Report.

For the foregoing reasons, it is, this 1st day of May, 1998, ORDERED, that the motion of the defendant to dismiss the complaint is granted; and it is

FURTHER ORDERED, that the complaint is dismissed with prejudice; and it is

FURTHER ORDERED, that the cross-motion of the plaintiff for partial summary judgment is denied as moot.

/s/
Thomas Penfield Jackson
U.S. District Judge

Section C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUM BIA

DANIEL BYRD, Ph.D.,
D.b.a. Consultants in Toxicology, Risk Assessment,
and Product Safety

Plaintiff,

v.

United States Environmental Protection Agency,
Defendant-Appellant.

Civil Action No. 97-1923 (TPJ)

DECLARATION OF DANIEL BYRD

1. My name is Daniel M. Byrd III. I work as a consulting toxicologist and risk assessor at Consultants in Toxicology, Risk Assessment and Product Safety (CTRAPS), Suite A-211, 1425 4th Street, SW, Washington, DC 20024, where my job title is President. I received a B.A. in 1964 from Yale College in New Haven, CT and a Ph.D. in Pharmacology in 1971 from Yale University. After passing an examination in toxicology and submitting my scientific credentials, the American Board of Toxicology conferred Diplomate status on me in 1982 and after subsequent review has recertified my status in 1987, 1992, and 1997.

2. Because I earn my living as a consulting toxicologist and risk assessor, demonstration of my expertise in these areas is important to my clients. I establish credentials for selected substances and methods by publishing articles in the scientific literature, attending scientific meetings and conferences, and submitting specialized comments to agencies about their

scientific judgments on related matters. I frequently attend, and plan to continue attending, meetings sponsored by the U.S. Environmental Protection Agency (EPA) about the toxicology and risks of specific air pollutants within my expertise, including alcohols, aldehydes, arsenic, beryllium, benzene, chlorinated solvents, coke oven emissions, dioxin-like substances, ionizing radiation, particulates, petroleum hydrocarbons, and silica. In addition, my professional practice involves work on the toxicology and risks of carbamates, coal tars, colorants, detergents, flame retardants, infectious diseases, food additives, mixtures, pesticides, nitroglycerine, nonionizing radiation, silica, soaps, and so-called "endocrine disruptors." I attend government meetings about these substances and about general matters, such as the methods and procedures used by EPA to evaluate toxicity and risk. For example, I recently attended an EPA-sponsored meeting about the dose-response relationship for arsenic-induced cancer, and I plan to participate in an EPA-sponsored conference call on January 7, 1998, of the Occurrence & Contaminant Selection Working Group of the National Drinking Water Advisory Council established under the Safe Drinking Water Act, as amended (41 U.S.C. S300f et seq.) to discuss EPA's list of microbial contaminants that merit priority attention. Access to such scientific meetings and conferences and knowledgeable participation in technical discussions in my field of expertise are important to my ability to advise my clients and to achieve results for them. For these reasons, I often augment my attendance and participation by obtaining participants' written comments and other public documents to review as early as possible in the meetings and conferences.

3. As for the EPA meeting at issue here, I have established an expertise concerning benzene. My publications, abstracts from presentations, and written comments to regulatory agencies about benzene include:

S.H. Lamm, D.M. Byrd and R.Wilson, Comments to the American Conference of Governmental Industrial Hygienists about a proposed revision of the *Threshold Limit Value for Benzene*, September 21, 1995.

F.B. Cross, D.M. Byrd, and L.Lave, Discernable Risk - A Proposed Standard for Significant Risk in Carcinogen Regulation. *Administrative Law Review 43*: 61-88 (1991).

E.T. Barfield, H. Gruenwald, S.H. Lamm, A. Walters, R. Wilson, and D.M. Byrd, Measurement Uncertainty in Epidemiological Studies of Two Cohorts Exhibiting Benzene-Induced Leukemia. (In) C. Zervos (Ed.) *Advances in Risk Analysis (Risk Analysis: Prospects and Opportunities). 10*: 731-740 (1991).

S.H. Lamm, A.S. Walters, R. Wilson, H. Gruenwald and D.M. Byrd, Benzene and Leukemia: What are the risks and what do the data reveal? (In) J.J. Bonin and D.E. Stevenson (Eds.) *Advances in Risk Analysis (Risk Assessment in Setting National Priorities). 7*: 417-430 (1989).

S.H. Lamm, A.S. Walters, R. Wilson, H. Gruenwald and D.M. Byrd, Consistencies and Inconsistencies Underlying the Quantitative Assessment of Leukemia Risk from Benzene Exposure. *Environmental Health Perspectives 82*: 289-297 (1989).

D.M. Byrd and E.T. Barfield, Uncertainty in the Estimation of Benzene Risks: Application of an Uncertainty Taxonomy to Risk Assessments Based on an Epidemiology Study of Rubber Hydrochloride Workers. *Environmental Health Perspectives 82*: 283-287 (1989).

S.H. Lamm, A.S. Walters, H. Gruenwald, D.M. Byrd, and R. Wilson, Clinical Types of Leukemia Associated with Occupational Benzene Exposure. *Journal of the American College of Toxicology 7:* 1050 (1988)

E.T. Barfield, H. Gruenwald, S.H. Lamm, A.Walters, R. Wilson and D.M. Byrd, Comparison of Measurement Uncertainty in some Epidemiology Studies of Benzene-Induced Leukemia. *Annual Meeting of the Society for Risk Analysis* (1988).

D.M. Byrd and E.T. Barfield, Empirical Degree-of-Belief Methods for Risk Assessments Based on Epidemiology Data: Application of a Procedure for Combinatorial Analysis of Risk-related Components to a Series of Occupational Studies of Leukemia Incidence Associated with Benzene Exposure at Several Rubber Hydrochloride Plants in Ohio. (In) R. Cothern and M. Mehlman (Eds.) *Risk Assessment and Risk Management of Industrial Chemicals.* Princeton Scientific Publishing pp. 209-223 (1988).

4. On July 16, 1997, I attended a meeting about a draft document, "Carcinogenic Effects of Benzene: An Update" (hereinafter "draft benzene update") in Washington, DC. I learned about the meeting through EPA's "notice of peer-review workshop and public comment period" in the Federal Register (Volume 62: Number 125, Pages 35172-35173, Monday, June 30, 1997). I understand that the reason EPA asked a contractor, Eastern Research Group (ERG), to convene the advisory committee was to obtain the experts' recommendations on the proper model for the relationship between the dose of benzene at given exposures and human cancer responses (potential health effects).

5. The shape of the dose-response relationship for benzene-induced leukemia is a crucial part of an assessment of the carcinogenic risks of benzene. Scientists and risk assessors,

both inside and outside EPA, generally seek a dose-response model that allows meaningful extrapolation from higher doses in occupational epidemiological studies to lower doses most people experience. A dose-response model is a fundamental component of the risk assessment of a substance or process. It usually determines the stringency of exposure limits established by EPA as standards for a range of regulations about a substance. Accordingly, the choice of a model has dramatic significance for the public health, the affected industry, and the costs of regulation. Benzene, the focus of EPA's advisory committee meeting, is one of the highest volume, most widely used petrochemicals in commerce. Consequently, benzene was an early subject of regulation under the Clean Air Act. The assessment of benzene risk also has functioned as an important case-study for all of regulatory risk assessment. Policies first developed in reviewing the data about benzene have been applied to other substances.

6. With regard to the draft benzene update that was the focus of the July 16 advisory committee meeting, I have fundamental questions about the adequacy and accuracy of EPA's choice of a dose-response model for benzene. Notably, I believe that EPA grossly overestimates the annual incidence of benzene-induced acute myelocytic leukemia cases in the U.S. population. The Agency's estimates are based on the assumption that the risk of such leukemia is directly proportional to benzene exposure, a linear relationship. EPA does not base this assumption on scientific fact but on policy. I think that both evidence and theory show that risk of exposure is proportional to no more than some power of benzene exposure, such as $[\text{benzene}]^2$ or $[\text{benzene}]^3$. These are nonlinear relationships. Significantly, I also think that benzene does not directly cause acute myelocytic leukemia. Instead, metabolic products of benzene cause certain conditions, such as myelodepression and myelofibrosis, and these precursor conditions lead to acute myelocytic leukemia. A nonlinear dose-response relationship for benzene-induced acute myelocytic leukemia cases predicts much lower and, I

believe, more accurate estimates of the number of benzene-related cases from general environmental exposures of the U.S. population.

7. Before the EPA meeting, I obtained and reviewed a copy of the draft benzene update. It was defective in several areas, including an omission of meaningful descriptions of potential precursor conditions to acute myelocytic leukemia associated with benzene exposure. EPA's draft benzene update in fact continues to advocate approximately the same model of how benzene affects humans as an earlier model proposed by the Agency in 1985. The draft benzene update ignores several recent scientific interpretations and consequently overestimates risk at substantial economic cost to the public and underestimates the risks of petroleum industry workers who might occasionally have exposures to very high concentrations of benzene.

8. The meeting was managed by a contractor, ERG. Although several EPA employees who had been involved in developing the draft benzene update attended the meeting and effectively participated as committee members, no EPA employee or officer supervised the conduct of the meeting. I did not observe any EPA or ERG employee keeping formal minutes of the meeting, but ERG did appear to make a tape recording of the meeting.

9. In discussions of the advisory committee during the meeting, several members noted the absence of information about precursor conditions to acute myeloid leukemia. The committee seemed at a loss, however, about how to remedy this deficiency. Various EPA officials stated that EPA would address these precursor conditions in a separate document about noncancer effects, to be produced later. Because EPA indicated that the convening of the workshop was a one-time event and because the committee members evidently lacked any avenue to pursue the matter further through the contractor, ERG, the committee seemed to regard the lack of information about precursor conditions in the draft benzene update as an accomplished fact.

10. The committee meeting was opened by an EPA officer, Dr. Michael Callahan. Then, Mr. David L. Bayliss, an EPA epidemiologist, displayed and discussed diagrams setting out EPA's next steps to prepare a final draft benzene update. He stated that EPA would consider comments from the advisory committee's review and comments received from the public during the comment period, then revise the draft benzene update. Subsequently, EPA would directly transmit the revised, final version to EPA's Office of Mobile Sources. EPA would not develop new standards until Mr. Bayliss transmitted the final benzene update to the Office of Mobile Sources, and the Office of Mobile Sources later applied the risk assessment in the final benzene update. After the public comment period closed, EPA would no longer entertain comments on the risk assessment. Based on the schedule set out by Mr. Bayliss, the July 16 expert meeting and the associated comment period were clearly the only opportunities for me and other interested experts to raise concerns about the applications of scientific and risk assessment policies within the draft benzene update. Mr. Bayliss also gave the panel the questions EPA wanted it to address.

11. I did not present my views about EPA's draft benzene update during the committee meeting. Twice I raised my hand to ask permission to speak, and the chair of the advisory committee, Dr. David Hoel, pointed to me, indicating that I should speak. On the first occasion, the committee seemed unable to resolve a problem about the use of data that had not undergone peer review and publication. In response, I briefly described longstanding, effective policies developed by EPA's Science Advisory Board to resolve such problems. On the second occasion, the committee seemed to misunderstand a recently published study about diseases in China, including acute myeloid leukemia, as a study of effects of benzene. In response, I pointed out that the Chinese cohort was composed of many groups, including house painters, and that given additional study the dominant exposure might not be to benzene at all, but to other substances, such as styrene, a

different petroleum hydrocarbon. On both occasions, I attempted to provide information that the advisory committee might find helpful in their deliberations. As I understood it, the purpose of the meeting was for EPA to receive advice from the committee members, not from me, and I therefore reserved my views about the draft benzene update for the public comment period.

12. During the meeting, the advisory committee made few comments about the overall scientific quality of the draft benzene update with respect to its purpose or to the advisability of the policy assumptions employed in estimating potential leukemic risks of benzene, beyond responding to some questions initially raised by Mr. Bayliss. At the beginning of the meeting, no EPA official (especially none from the Office of Mobile Sources) briefed the committee on EPA's intended uses of the proposed dose-response model for benzene. I did not see how a committee could advise EPA about the scientific adequacy of the draft benzene update without an understanding of how EPA would use the proposed dose-response model in setting standards and developing regulations. For example, if the Office of Mobile Sources intended to regulate benzene in motor gasoline emissions, EPA's intent would become highly important. Other petroleum hydrocarbons present in motor gasoline are known to alter the health effects and risks of benzene. Thus, I was concerned that the Office of Mobile Sources and others would misconstrue the committee's comments as showing approval by the scientific community of EPA's plans for the regulatory use of the dose-response model in the draft benzene update.

13. I sought to confirm either that the advisory committee members had focused their efforts on a list of questions provided before the meeting or that they had noted the lack of information about precursor conditions to acute myeloid leukemia in the draft benzene update. Multiple copies of comments written by committee members before the meeting were evident on a table where they sat, facing away from the observers' seating. During the break for lunch, I asked Ms.

Mora Evans, an employee of ERG at the meeting site who provided logistical support for the committee members and EPA staff, for copies of these written comments. She replied that those comments were only for EPA and declined to give them to me.

14. I persisted in trying to obtain copies of these comments. During the period provided for public comments near the end of the meeting, I asked Dr. Hoel for copies of the written premeeting comments. I explained to the committee that I probably could obtain the written premeeting comments through other means, but that I would have to consult with my attorneys about the best legal approach, perhaps the Freedom of Information Act, the Clean Air Act, or through another means. I stated that I did not see the purpose of making me expend funds, time, and emotional energy to go through legal procedures to obtain the written premeeting comments, when they could simply hand me a set. Dr. Hoel replied that he had no authority to release the written premeeting comments to me, but he noted that he had no problem in my receiving copies. Ms. Evans also interjected, repeating that she lacked authorization to distribute copies of the committee's written comments.

15. After the meeting concluded, Dr. Babasaheb Sonawane, an EPA official attending the meeting, approached me. I asked if I could obtain copies of the committee's written comments from him. He replied that he would have to consult with his attorneys. I then repeated to him that I planned to consult with my attorneys to decide the best course of action in my self interest and that I could not say what route they would suggest to remedy some deficiencies in the meeting, perhaps the Freedom of Information Act, the Clean Air Act or another statute. I neither heard from him nor received any materials from him (or his attorneys) before filing the present complaint [Civil Action No. 97-1923].

16. EPA submitted its first choice of dose-response model for benzene to EPA's Science Advisory Board in 1977 for scientific peer review. EPA published the final version of this document in 1979, as the "Final Report on Population Risk to Ambient Benzene Exposure [PB82-227372]." EPA revised its assessment of benzene's health significance in a second, 1985 document "Interim Quantitative Cancer Unit Risk Estimates Due to Inhalation of Benzene [OHEA-C-153]," which was extremely controversial. Its primary author, Dr. Todd Thorslund, denounced the 1985 assessment at several scientific meetings and complained that he based it on secondary sources, because of bureaucratically imposed time constraints. Perhaps for this reason EPA did not attempt to obtain scientific peer review of the 1985 benzene risk assessment until the July 16, 1997 meeting. EPA essentially derived the new, draft benzene update from the 1985 assessment.

17. In comparison to benzene, EPA has historically and routinely presented its risk assessments of other hazardous air pollutants to its Science Advisory Board for peer review. Before the 1990 amendments to the Clean Air Act, the Science Advisory Board also reviewed the Agency's determination that a substance was hazardous when inhaled. After passage of the 1990 amendments, Congress removed discretion about the latter determination from EPA by listing the hazardous air pollutants, including benzene, that EPA should regulate. The Clean Air Act contemplates review of risk assessments of hazardous air pollutants by the Science Advisory Board.

18. I served as the Executive Secretary of the Environmental Health Committee of EPA's Science Advisory Board from 1984 to 1987. The Science Advisory Board operates with partial independence from other EPA programs under a Federal Advisory Committee Act (FACA) charter, and in my experience it usually complies with the provisions of FACA. The Science Advisory Board is free to, and occasionally does, reject EPA risk assessments as unacceptable. The Science

Advisory Board peer review process does not allow substantive supervision of or participation in its committees and subcommittees by persons directly involved in preparing the risk assessments under review. Possibly as a result of the different management of the peer review panel in this case, although some members of the panel voiced probing questions about the currency and adequacy of the benzene dose-response model, the report prepared by ERG under EPA's supervision neither fully reflects the questions nor explicates the alternative impacts of various answers to the questions on the dose-response model. Likewise, the Science Advisory Board process has no analogue to the narrowly circumscribed questions that Mr. Bayliss asked the committee to address.

19. In my experience as a toxicologist and risk assessor, a scientific peer review can provide some assurance that an assessment references all of the relevant data, that a technically competent organization has interpreted the data correctly, that these interpretations reflect mainstream views of the scientific community or are consistent with generally accepted theories, that policy judgements and assumptions are internally consistent with the data and interpretations, and that the assessment is scientifically adequate for its intended purposes. Scientific peer review can be an important element in informal rulemaking to insulate a risk assessment from undue influence by affected parties. Proper peer reviews also serve the judicial system in the sense that judges can refer to them for information about the objectivity of an Agency's evaluation of scientific information. Most scientists consider independent peer review a critical step in the preparation of any risk assessment with widespread impacts. However, the way that EPA controlled the advisory committee in this instance substantially compromised the committee's independence.

20. If EPA repeated the July 16 advisory committee meeting under conditions consistent with FACA requirements - which would have provided the members part of the independence

necessary to consider and express expert opinions and conclusions - I think it highly likely that the reviewers would have rejected the draft benzene update as incomplete, by requesting that EPA include a complete description of the precursor conditions that may lead to acute myelocytic leukemia in a revised draft and resubmit the revised draft for additional scientific peer review. More generally, establishing a charter for the advisory committee for benzene and appointing an EPA employee as an official point of reference would have enhanced the independence of the reviewers.

21. Some data on which EPA would base dose-response models for emissions standards of hazardous air pollutants designated by Congress in the 1990 Clean Air Act amendments have not undergone peer review. Few risk assessments of these hazardous air pollutants exist, and EPA has created most of those. If EPA is allowed to evade FACA requirements in the way it has sought in this instance, it will have a substantial incentive to hire contractors for peer reviews, to constrict the scope of each review, to supervise each review closely, and to advertise that the assessment and its underlying data have been "peer-reviewed." Such a process will result in public confusion between EPA's intentions and the views of the scientific community. Because risk assessments involve science-based judgement, risk assessments are intrinsically controversial, involving many matters of policy. In understandably trying to avoid the burden of dealing with these controversies, however, the Agency will also avoid any views and data that do not originate internally within EPA and the contractors under its control.

22. As a related matter, after the July 16 meeting, I discovered that EPA had previously retained a member of the committee, Dr. David Eastmond, an employee of the University of California at Riverside, as a contractor to prepare a closely related document, *Chemical and Radiation Leukemogenesis in Humans and Rodents and the Value of*

Rodent Models for Assessing Risks of Lymphohematopoietic Cancers (EPA/600/R-97/090; May, 1997) under the supervision of Dr. Charlie Hiremath, an EPA employee. I have read this document, and it covers several topics that overlap sections of the draft benzene update with essentially identical interpretations. Dr. Hiremath also supervised ERG in providing administrative support for the July 16 meeting and recommended that ERG retain Dr. Eastmond. In my opinion, Dr. Eastmond should have recused himself from service on a committee that was, in effect, reviewing his own work or should at a minimum have disclosed the issue (which did not occur at the July 16 meeting). Further, because Dr. Eastmond worked as an EPA contractor in preparing a related document, which summarized EPA's views about benzene on several topics, and because he continued to present EPA's views while on the committee, his presence compromised the independence of the peer review. As noted above, had EPA asked the Science Advisory Board to provide the peer review instead of convening the panel through ERG, the Board would not have allowed Dr. Eastmond to participate, given his conflict. Also the National Environmental Policy Institute's recent set of recommendations on improving the use of peer review in EPA decisionmaking, a copy of which is attached, recommended disclosure of the kind of conflict Dr. Eastmond had in this case.

23. I have spoken with colleagues in other organizations who are interested in the draft benzene update, and several have shown frustration at the unavailability of the advisory committee's written comments at the public meeting, contrary to the usual practice at workshop meetings. Several stated that they would likely submit additional written comments to EPA, or submit comments for the first time, if EPA made the written comments of the July 16 committee available.

I declare under the penalty of perjury under the laws of the United States of America that to the best of my knowledge and belief, the foregoing is true and correct.

Executed on December 30, 1997 /s/ Daniel M. Byrd III

DANIEL M. BYRD III

Section D

"FEDERAL ADVISORY COMMITTEE ACT"*

§ 1. Short title

this Act may be cited as the "Federal Advisory Committee Act".

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

(1) the need for many existing advisory committees has not been adequately reviewed; (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary; (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established; (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees; (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act--

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* Downloaded Dec.. 1999 from Gen. Servs. Admin. site at http: // policyworks.gov/org/main/mc/index-la.htm

(1) The term "Administrator" means the Administrator of General Services. (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government. (3) The term "agency" has the same meaning as in section 551(1) of Title 5. (4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by--

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System. (c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection. (b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the

duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection

(b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total

estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine--

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether is should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the

Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that--

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members--

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of Title 5, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such Title 5), may be provided services pursuant to section 3102 of such Title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent--

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee, from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States. (e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

§ 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall--

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is--

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall

be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal

s 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress

shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§ 14.Termination of advisory committees; renewal; continuation

(a) (1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b) (1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

§ 15. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.